***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

B P/S

# 75-1115

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

STEPHEN CARROLL,

Appellant.

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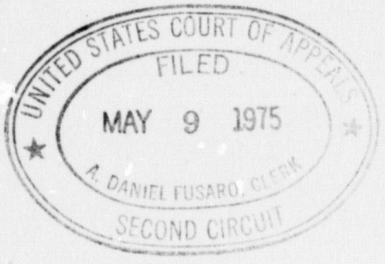
Docket No. 75-1115

## BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK




WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel

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# BRIEF FOR APPELLANT

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## QUESTION PRESENTED

Whether the actions of the prosecutor in this case resulted in prejudice requiring reversal.

## STATEMENT PURSUANT TO RULE 28(a)(3)

### Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Robert J. Ward) rendered on March 19, 1975, after a trial before a jury, convicting appellant of possession with intent to distribute, and distribution of, a Schedule I narcotic substance (21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A) (Count One).* Appellant was sentenced for an examination pursuant to 18 U.S.C. §5010(e) to determine his eligibility for a Young Adult Offender sentence, after which he is to be returned to the District Court for imposition of sentence.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

### Statement of Facts

Appellant Carroll and George O'Brien were charged with a sale of 500 tablets of LSD for $400. The Drug Enforcement Administration agents began their investigation of appellant

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*George O'Brien was also charged in Count One. A second count against O'Brien charged him with resisting arrest. Apparently O'Brien is a fugitive (see the District Court docket sheet entry of February 10, 1975 (Appellant's Appendix at "A").

with the arrest in mid-October, 1973, of Richard Simmons, for a drug violation (36*). Simmons acted as an informer for the Drug Enforcement Administration, working with Agent Daniel Lieneck (40), in exchange for which the Administration was to advise the judge who would sentence Simmons of his cooperation (96). Simmons had psychiatric problems and a history of such problems (101, 103). He had known appellant for about seven years and, at the time of these events, appellant and Simmons had been living in the same apartment for about six months (48, 104).

According to the Government's witnesses,** on October 24, 1973, Simmons, appellant, and George O'Brien met in Central Park (76). Simmons then left the other two, but joined appellant shortly thereafter. He and appellant then walked up the street, and while they were walking appellant gave Simmons what was later ascertained to be three LSD tablets (78).

On October 26, 1973, Simmons introduced appellant to Undercover Agent Cavuto, and then left. Appellant and Cavuto drove to Central Park, where they met O'Brien. O'Brien gave Cavuto 500 LSD tablets for $400 (54). O'Brien said that other sales could be arranged (29, 32, 81), and that Cavuto could reach him through appellant (29) or in the Sheep Meadow area of Central Park.

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*Numerals in parentheses refer to pages of the trial transcript.

**These witnesses were Agent Lieneck, Undercover Agent Cavuto, and Surveillance Agent Rabourn.

Appellant gave Cavuto a Crackerjacks box in which to put the tablets (69). Cavuto and appellant then left the park. Appellant returned to O'Brien, and O'Brien handed him something (139).

On November 21, 1973, Cavuto called appellant.* Appellant told Cavuto that O'Brien had gone to Florida, and indicated he knew another persons who had drugs to supply (32).**

On January 21, 1974, appellant was arrested (82), and in two statements -- one given to the agents after his arrest, and the other to the prosecutor the following day -- admitted his participation in the sale (86, 87).

Appellant's defense was that Simmons, acting as an informer for the Government, had induced him into participating in the sale of the LSD tablets. He testified that he had been a heroin user for two and a half years, and that his heroin was purchased on the street (169). Since March 2, 1972, he had been on daily methadone maintenance (167). Appellant acknowledged selling marijuana in 1969 and 1970, but denied selling any other kind of drug (170).

In June 1973, appellant went to live with Simmons, a 230 pound, 6'2" tall writer for a muscle magazine (178). Appellant had no place to live, and no money. Simmons, whose

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*Apparently this call was in response to calls appellant had made to Cavuto (209).

**This conversation was recorded and the recording transcribed. The tape was played to the jurors (160), who used the transcript while listening (35).

parents paid for his apartment, let appellant live with him without cost, except to provide food when possible (172-174).

Appellant explained that, on or about October 15, 1973,* Simmons reported that his parents would no longer agree to pay the rent, and that the two of them would be out on the street unless they could get some money (178). Simmons said that appellant should try to get some of the money since he had lived at the apartment without cost for six months (179). Appellant suggested they find jobs, but none would pay enough to supply the funds they needed (179). About two days later, Simmons said that he had a friend named Tony (Cavuto), who wanted to buy 500 LSD tablets (179). Appellant said he did not know anyone who had the tablets, and further, that it was dangerous to sell drugs. Simmons told appellant he was obligated to help find the tablets (180). Appellant refused because he didn't know anyone who could supply LSD and didn't want to get involved.

Simmons kept pushing appellant over a period of three or four days (185) to find a source, arguing that appellant owed it to Simmons for all the time Simmons had helped him. Simmons agreed to conduct the transaction himself if appellant would make the introduction (182).

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*By this time Simmons had been arrested. Appellant knew of the arrest, but was not sure what the charges were (187).

Finally, with no place to go, appellant agreed to try to find a source (183) and to meet Tony (188). Appellant met George O'Brien and asked if he knew anyone who would sell LSD. George wanted to deal with appellant, not Simmons.* Simmons told appellant to find out what George's price was, and then to add the cost of the apartment (190). Simmons said they would have to make $145 on the deal (191-192).

On the transaction, appellant got $145 from George, and gave all but five dollars of it to Simmons (194).

Appellant explained that, while in the telephone call of November 21, 1973, he referred to another supplier, he really had no other supplier, and that he did not know whether George had left for Florida.

The prosecutor opened his cross-examination of appellant by asking whether he used the names "Kaiser Wilhelm" or "Satan" (197-198). Later on, the Assistant United States Attorney inquired whether, in 1971 and 1972, appellant sold the methamphetamines Simmons manufactured (222). Defense counsel requested a bench conference (222) on the issue of a good faith basis for the question, and the Assistant United States Attorney responded that it was Simmons who had revealed that appellant had sold the drugs (223). A little later, the prosecutor asked if

*Appellant had first met O'Brien in 1967, had lost contact with him, and then met him again in February 1973 (200). At that time, O'Brien asked appellant to let him know if anyone was interested in buying LSD (201).

appellant sold the methadone he got from his clinic (226), and then whether, in 1969, appellant sold two pounds of methamphetamines for $7,000 (226) and if, in 1969, appellant worked in a laboratory making methamphetamines and if he had not sold this drug.*

Defense counsel requested that the Judge end the line of inquiry. The Judge instead instructed the jurors that no information was to be inferred from the mere question (228).

In his summation, the prosecutor stated to the jurors:

> Now, there has also been a suggestion by the defense that the Drug Enforcement Administration through Mr. Simmons was pursuing Mr. Carroll. That's correct, it is the purpose of the Drug Enforcement Administration to ferret out drug dealers which is what Mr. Carroll was by his own admission. Indeed, this case presents I suggest to you a very useful look at how the Drug Enforcement Administration operates.
>
> In drug transactions there are hierarchy chains of supply. There are several levels of wholesalers, there are retailers and there are customers. The Drug Enforcement Administration tries to go as far as possible through this chain of supply. The progress of this case, I submit to you, is typical. Richard Simmons, you will remember, is arrested. He is a drug manufacturer and a drug dealer.
>
> The agents who were as attentive as they should be about this are not content with the investigation stopping with Mr. Simmons. They pursue it further. Simmons leads them to Stephen Carroll, a new link in the chain of supply.
>
> (264-265).

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*The answer to all these questions was "no" (222, 226, 227, 228).

Later, the prosecutor added:

> As I was telling you ladies and gentlemen, on the day that Mr. Carroll answered the questions about George O'Brien, George O'Brien was arrested.
>
> (266).

The jurors were instructed* on the defense of entrapment. After deliberations, they found appellant guilty.

On the date of sentencing, defense counsel made a motion for a new trial on the grounds of prosecutorial overreaching. In his motion, counsel urged that it was error for the prosecutor to ask the questions outlined above (314-316). The prosecutor responded that he had a reasonable basis for the questions because of his interviews with Simmons (325), and stated:

> In addition, I had a good faith basis for the questions, your Honor. Your Honor will recall that prior to asking the questions directly I asked Mr. Carroll on one occasion if he lived at a certain address because my information was while living at that address he engaged in the sales, and Mr. Carroll said he had lived at the address.
>
> Prior to another series of questions I asked him if he knew a Michael Robert Welkey, also known as Mulsh. He said he did know him. So I felt that I had some reasonable basis for asking the questions, your Honor.
>
> (324).

Judge Ward denied the motion, stating that the trial was fair (329).

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*The entire charge is "C" to appellant's separate appendix.

## ARGUMENT

### THE ACTIONS OF THE PROSECUTOR IN THIS CASE RESULTED IN PREJUDICE REQUIRING REVERSAL.

Just prior to sentencing, defense counsel made a motion for a new trial because of the conduct of the prosecutor, which prejudiced the jury's fair and proper evaluation of the entrapment defense. The prosecutor's prejudicial conduct was a portion of his statement in summation and a series of questions asked of the appellant in cross-examination.

The motion was denied on the ground that a defendant is entitled to a fair, but not a perfect, trial.

In his summation, the Assistant United States Attorney made references to facts which were not presented in the testimony of any witness. The references were to the purposes of the Drug Enforcement Administration's investigations, to the way in which these investigations proceed from one person to another, and to the arrest of George O'Brien right after appellant had identified O'Brien as his supplier.

The reference to these factors, about which there was no testimony, and consequently no cross-examination, was improper. United States v. Grunberger, 431 F.2d 1062 (2d Cir. 1970); King v. United States, 372 F.2d 383 (D.C. Cir. 1960); Jones v. United States, 338 F.2d 553 (D.C. Cir. 1964); United States v. Spanglet, 258 F.2d 338 (2d Cir. 1958).

The statement of the prosecutor was made for the purpose

of convincing the jurors that the general way in which the Drug Enforcement Administration functions is organized, systematic, and methodical, and that the procedures with respect to appellant thus must have been similarly conducted. This was obviously interposed to counter appellant's defense of entrapment by telling the jury that the Drug Enforcement Administration would not engage in such kinds of activity. The prejudice to the defense by such statements is obvious.

Further, the fact that these statements were made by the prosecutor gave them added significance, for they were accompanied by the prestige of his office and his own credibility. Without any support in the record for his explanation, the prosecutor in essence explained to the jury the procedures of the Drug Enforcement Administration, and therefore prevented examination by the defense as to whether these procedures are always followed. That was precisely the result sought to be avoided in Berger v. United States, 295 U.S. 78 (1935):

> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations which so plainly rest upon the prosecuting attorney will be faithfully observed. Consequently, improper suggestions, insinuations, and especially assertions of personal knowledge are apt to carry much weight against the accused whey they should properly carry none.
>
> Id., at 84.

In United States v. Spanglet, supra, this Court reversed a conviction because the prosecutor, in an attempt to dispel the inference that he had made a deal with a witness, stated

in his summation that he had been in the United States Attorney's office for two and a half years and had never made a deal with anybody. This Court held:

> It is well settled that the jury's consideration in a case should be limited to those matters already in evidence and that the summation should not be used to put before the jury facts not actually presented in evidence. This doctrine is especially important in criminal trials. The prosecution represents "a sovereignty whose obligation is to govern impartially." Berger v. United States, [supra,] 295 U.S. 78. As Berger suggests, this obligation may cause a jury to place more confidence in the word of a United States Attorney than in that of an ordinary member of the Bar.... [I]n effect, he gave testimony as to a fact allegedly within his personal knowledge without taking an oath or subjecting himself to cross-examination. People v. Lorello, 1956, 1 N.Y.2d 436, 154 N.Y.S.2d 8, 136 N.E.2d 483.
>
> Id., 258 F.2d 338.

See also United States v. Puco, 436 F.2d 761 (2d Cir. 1971); United States v. Grungerger, supra, 431 F.2d 1062; Greenberg v. United States, 280 F.2d 472 (1st Cir. 1970).

The prosecutor's questioning of appellant on cross-examination was also improper. The Assistant United States Attorney posed a series of extremely damaging questions to appellant, inquiring whether he had engaged in manufacture and sales of methamphetamines: did appellant sell the methamphetamines Simmons manufactured (222); did appellant sell the methadone he obtained from his clinic (226); did appellant, in 1969, sell two pounds of methamphetamines for $7,000 (229); did appellant, in 1969, work in a laboratory making methamphetamines

and did he not sell this drug.

When the first question was posed, defense counsel asked for a foundation for such questions. The prosecutor responded that the factual bases for his inquiry came from Simmons, the informer who had introduced appellant to Agent Cavuto. Counsel argued that Simmons was not a reliable source of information.

When counsel's objection was again raised prior to sentence, the prosecutor again relied on Simmons' information and on the belief, based on an unspecified source of information, that while appellant lived at a certain address he sold drugs, and appellant's acknowledgment that he knew a man named Mulsh.

While it was the prosecutor's burden to establish appellant's propensity to sell drugs, it was error to do so by means of questions about prior acts of misconduct which he apparently had no reason to suppose were committed. 2 Wigmore, EVIDENCE, §780 at 173 (Chadbourn Revision 1970).

Simmons, the alleged source of information about the prior alleged sales, was clearly a person who had every reason to try to convince the Assistant United States Attorney that he was cooperating by handing over an individual who was extensively involved in the drug business. Further, Simmons had a prior psychiatric record which might well have rendered him totally unreliable.

The other source of information mentioned by the prosecutor remained unidentified and vague. This does not provide an adequate factual basis for the questions the prosecutor

asked regarding sales of drugs. The admission by appellant that he knew a man named Mulsh similarly cannot be the basis for a question implying that appellant worked in a laboratory run by Mulsh which produced drugs, and the further inference that appellant sold those drugs.

The clear result of these questions was to imply to the jurors that appellant was a drug seller and that he therefore had the propensity required to defeat the entrapment defense. Appellant's denial of any such behavior, and the Judge's charge that the jurors were not to consider the questions as evidence, were not curative of the error, for the jurors must have believed that the prosecutor had some basis for his questions, although none was shown.

## CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and the case remanded for a new trial.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel

Certificate of Service

May 9, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.